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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, ) CR-14-00175-WHA

Plaintiff,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

) UNITED STATES'S RESPONSE TO COURT'S  
) ORDER TO SHOW CAUSE [Dkt. 961] AND  
) REQUEST FOR COMMENT [Dkt. 970]

The United States, through Assistant United States Attorneys Hallie Mitchell Hoffman, Philip Kopczynski, and Jeff Schenk, responds to the Court's order to show cause why PG&E's conditions of probation should not be modified as stated therein, Dkt. 961, and the Court's request for comment on the single most recurring cause of the large 2017 and 2018 wildfires attributable to PG&E's equipment, Dkt. 970.

I.APPLICABLE LAW

Organizational probationers are subject to the same laws that govern individual probationers.

1 U.S.C. § 3551(c)(1). When setting the terms of probation for an organizational defendant, just as for an  
2 individual defendant, the court may impose any condition that is “reasonably related to the factors set  
3 forth in [18 U.S.C. §] 3553(a)(1) and (a)(2),” so long as the condition “involve[s] only such  
4 deprivations of liberty or property as are reasonably necessary for the purposes indicated in section  
5 3553(a)(2).” 18 U.S.C. § 3563(b)(22). The factors set forth in Section 3553(a)(1) and (2) include,  
6 among others, “the nature and circumstances of the offense and the history and characteristics of the  
7 defendant,” and “the need for the sentence imposed . . . to reflect the seriousness of the offense, to  
8 promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate  
9 deterrence to criminal conduct; . . . [and] to protect the public from further crimes of the defendant.” 18  
10 U.S.C. § 3553(a)(1)-(2).

11 While a defendant is serving a term of probation, “[t]he court may modify, reduce, or enlarge the  
12 conditions . . . at any time . . . , pursuant to the provisions of the Federal Rules of Criminal Procedure  
13 relating to the modification of probation and the provisions applicable to the initial setting of the  
14 conditions of probation.” 18 U.S.C. § 3563(c); *see also United States v. Bainbridge*, 746 F.3d 943, 946-  
15 50 (9th Cir. 2014) (holding that district court may modify conditions of probation without any “change  
16 in circumstances”). The Federal Rules of Criminal Procedure provide that “[b]efore modifying the  
17 conditions of probation . . . , the court must hold a hearing, at which the person has the right to counsel  
18 and an opportunity to make a statement and present any information in mitigation.” Fed. R. Crim. P.  
19 32.1(c)(1). A hearing is not required, however, if the defendant waives it. Fed. R. Crim. P. 32.1(c)(2).

20 In addition to Title 18 and the Federal Rules, the United States Sentencing Guidelines  
21 (“Guidelines”) address probation for organizational defendants. The Guidelines state that probation is  
22 appropriate for organizational defendants in many circumstances, including when “necessary to ensure  
23 that changes are made within the organization to reduce the likelihood of future criminal conduct,” and  
24 when “necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C.  
25 § 3553(a)(2).” U.S.S.G. § 8D1.1(a)(6), (8). The Guidelines further state that “[i]n determining the  
26 conditions to be imposed . . . , the court should consider the views of any governmental regulatory body  
27 that oversees conduct of the organization relating to the instant offense.” U.S.S.G. § 8D1.4 cmt. 1.

28 Consistent with these provisions, the Ninth Circuit has long held that, within certain limitations,

“the trial judge has very broad discretion in fixing the terms and conditions of probation.” *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975) (en banc). The Ninth Circuit reviews a district court’s modification of conditions of probation for abuse of discretion. *United States v. Nixon*, 839 F.3d 885, 887 (9th Cir. 2016). A condition of probation “need not relate to the offense of conviction, as long as it satisfies one of the . . . goals” set forth in Section 3553(a)(1) and (2). *United States v. Weber*, 451 F.3d 552, 558 (9th Cir. 2006); accord *United States v. Stoterau*, 524 F.3d 988, 1008 (9th Cir. 2008).<sup>1</sup> Moreover, the statutory requirement that a condition of probation be reasonably related to the Section 3553(a) factors is “a very flexible standard.” *United States v. Gementera*, 379 F.3d 596, 603 (9th Cir. 2004) (internal quotation marks and citations omitted). “[E]ven very broad conditions are reasonable if they are intended to promote the probationer’s rehabilitation and to protect the public.” *United States v. Bee*, 162 F.3d 1232, 1236 (9th Cir. 1998). In addition, a condition may have a proper rehabilitative purpose even if it is aimed at conduct that does not rise to the level of a criminal offense. See *United States v. LaCoste*, 821 F.3d 1187, 1192 (9th Cir. 2016). The Ninth Circuit has affirmed conditions of probation that restrict or interfere with the probationer’s vocation so long as the condition is reasonably necessary to achieve a proper purpose, such as protection of the public. See *United States v. Clark*, 195 F.3d 446, 452 (9th Cir. 1999); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594, 596 (9th Cir. 1974).

Specific to organizational defendants, the Ninth Circuit “has recognized that special problems are inherent in the criminal punishment of corporations.” *United States v. Blue Mountain Bottling Co. of Walla Walla*, 929 F.2d 526, 528 (9th Cir. 1991). One such problem is that “because corporations cannot be sentenced to prison time, sentences between corporate and individual defendants may be disparate.” *Id.* According to the Ninth Circuit, “‘creative terms of probation’ may be required to rectify this disparity while seeing that the punishment of criminals is effected.” *Id.* (quoting *United States v. Mitsubishi Int’l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982)).

While regularly reaffirming that district courts “enjoy broad discretion in fashioning the conditions needed for successful supervision of a defendant,” and that district courts’ choices will

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<sup>1</sup> *Weber* and *Stoterau* concerned supervised release but the analysis of probation and supervised release is largely the same. Compare 18 U.S.C. § 3563 with 18 U.S.C. § 3583; see also, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *United States v. Kincade*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (en banc).

1 receive “substantial deference,” the Ninth Circuit has insisted that conditions of supervision find support  
2 in the record, and that the conditions be no broader than reasonably necessary. *See LaCoste*, 821 F.3d at  
3 1190. In *LaCoste*, for example, the Ninth Circuit vacated a condition of supervised release prohibiting a  
4 defendant from using the internet without the prior approval of his probation officer, where the record  
5 revealed only that the defendant had used the internet to post disparaging comments about some of his  
6 fraud victims. *Id.* at 1191. In *United States v. Collins*, 684 F.3d 873 (9th Cir. 2012), the Ninth Circuit  
7 vacated a condition restricting where the defendant could reside, although state law already imposed a  
8 similar restriction on the defendant, because the condition was a “serious restriction” that lacked  
9 “sufficient explanation,” and because the district court failed “to analyze the appropriateness of [the  
10 residency restriction] pursuant to the required federal sentencing factors, notwithstanding any related  
11 state law restrictions.” *Id.* at 890-92. Meanwhile, in *United States v. Watson*, 582 F.3d 974 (9th Cir.  
12 2009), which was an appeal from a judgment of this Court, the Ninth Circuit upheld a condition  
13 prohibiting the defendant from entering San Francisco without the permission of his probation officer,  
14 because, after “a careful examination of the justifying factors,” the Ninth Circuit found sufficient  
15 support for this condition in the record. *Id.* at 983.

## 16 II. THE UNITED STATES’S VIEW ON THE PROPOSED CONDITIONS 17 OF PROBATION

18 This Court has proposed three new conditions to PG&E’s probation. Order to Show Cause, Dkt.  
19 961 at 2-4. First, the Court proposes that it will require PG&E to re-inspect its entire electrical grid and  
20 remove or trim certain trees and branches, identify and fix certain conductors, identify and fix certain  
21 poles, transformers, fuses and other connectors, and identify and fix other conditions. Second, the Court  
22 proposes to require PG&E to document the foregoing inspections and work done. Finally, the Court  
23 proposes to allow PG&E to supply electricity only through those parts of its grid it has determined to be  
24 safe.

25 While the United States shares the Court’s interest in imposing conditions of probation aimed at  
26 ensuring that the inhabitants of the Northern District are protected from the death and destruction  
27 caused by wildfires, on this record, the United States is not in a position to address the feasibility of  
28 implementing the conditions and the chance that they will effectuate that goal. As a threshold matter,

1 the government does not believe the record supports imposition of the proposed conditions as they are  
2 currently drafted. Moreover, as drafted, the Court's proposed conditions may overlap with state and  
3 federal regulations (*e.g.*, the Federal Power Act and the California Public Utilities Code) and touch on  
4 the province of state and federal regulators (*e.g.*, California Public Utilities Commission (CPUC) and the  
5 Federal Energy Regulatory Commission). PG&E's efforts to comply with the proposed conditions  
6 could also implicate additional regulations and agencies, such as the Endangered Species Act, the  
7 Bureau of Land Management, and the U.S. Department of the Interior.

8 Because of the complexity of the regulatory scheme involved in electric transmission and  
9 distribution lines, the government recommends that the Court request that the Monitor review and  
10 evaluate the proposed probation conditions.

11 The Monitor is in a unique position to perform this work. According to the Monitor's recent  
12 submission to the Court, the Monitor has already begun to assess PG&E's current and future vegetation  
13 management programs, and its pole and equipment inspection and maintenance programs. Dkt. 958 at  
14 2. The Monitor's work, thus far, has focused on PG&E's electric distribution systems, but the Court  
15 also could order the Monitor to oversee PG&E's electric transmission system. Furthermore, the Monitor  
16 believes certain agencies, such as the California Department of Forestry and Fire Prevention ("Cal Fire")  
17 and the CPUC, will make specific recommendations, requirements, and changes to PG&E's electric  
18 operations. *Id.* Once these recommendations are made, the Monitor will evaluate and assess how  
19 PG&E incorporates and complies with them. *Id.* This relevant experience places the Monitor in the best  
20 position to determine whether wildfires can be prevented by fixing gaps in the currently regulatory  
21 scheme, or by improving PG&E's compliance with current regulations. If the Monitor believes new  
22 probation conditions are appropriate, then the Monitor can draft these conditions after consulting with  
23 federal and state regulatory agencies, and thereby ensure that they are properly tailored to remedy  
24 specific harm without conflicting with existing regulations.

25 In sum, the United States recommends that the Monitor review the Court's proposed probation  
26 conditions, consult with relevant agencies, and draft a final set of workable probation conditions that  
27 achieve the Court's goals while minimizing enforcement challenges.

1 III.TENTATIVE FINDING REGARDING CAUSE OF WILDFIRES ATTRIBUTABLE TO  
2 PG&E'S EQUIPMENT

3 On January 17, 2019, this Court issued a tentative finding concerning the "single most recurring  
4 cause of the 2017 and 2018 large wildfires attributable to PG&E's equipment." Request for Comment,  
5 Dkt. 970. The Court tentatively found that the single most recurring cause was that PG&E's distribution  
6 lines have been susceptible "to trees or limbs falling onto the lines during high-wind events." *Id.*

7 In reviewing the materials PG&E submitted to the Court, including Docket No. 956, the  
8 government believes that the Court's finding is accurate as to more than half of the large 2017 and 2018  
9 wildfires. However, the government's conclusion is based solely on the documents PG&E submitted to  
10 the Court. The government is only aware of completed and public Cal Fire investigation reports as to  
11 the La Porte, Nuns, Redwood, Thirty Seven, Cherokee, and Cascade fires. The government has  
12 reviewed redacted versions of these reports, but it would require experts to assist it in drawing  
13 conclusions concerning causation.

14 In any event, the government submits that the Monitor would be in the best position to review  
15 available, relevant information concerning causation. While the Monitor has not attempted to determine  
16 causation, his team includes subject matter experts. Dkt. 958. For our purposes, PG&E's role in  
17 causing the wildfires is relevant not only to determine whether it has violated its terms of probation, but  
18 also to prevent future harm. To address causation, the Court should employ the Monitor's subject matter  
19 experts. These experts can help answer the question of whether the 2017 and 2018 wildfires were  
20 caused because PG&E did not comply with existing, sufficient regulations (suggesting that additional  
21 probation conditions are probably not necessary) or because existing regulations do not sufficiently  
22 mitigate fire danger caused by PG&E's electric grid (suggesting that additional probation conditions – or  
23 simply additional regulations – are necessary).

1 DATED: January 23, 2019

Respectfully submitted,

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4 /s/

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